NO. 80-1678

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1980

MAY 18 1981

ALEXANDER L. STEVAS,
CLERK

NORA FAYE JOHNSON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY
TO RESPONDENT'S MEMORANDUM
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

The Department of Justice's memorandum in opposition to the granting of the Petition for Certiorari misses the entire point of the petition; i.e., that the Fifth Circuit opinion construed the Federal Tort Claims Act ("Act") in a way that conflicts with the prior decision of this Court in Brooks v. United States, 337 U.S. 49 (1949). It also erroneously seeks to apply the Feres doctrine by completely overlooking the holding in Feres; i.e.:

> Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under[1]

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[1]Emphasis supplied throughout unless otherwise noted.

orders. Feres v. United States, 340 U.S. 135 (1950), 95 L.Ed. 152.

It ignores the specific wording of the Act which provides:

> ...[T]he district court...'shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages,' accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C., § 1346(b).

It is elementary law that a claim for negligence does not arise until there is some injury. The

Fifth Circuit recognized this fact in an excellent opinion written by Chief Justice Brown on behalf of the Court where it held in United states v. Reid, 251 F.2d 691 (5th Cir. 1958):

> The question concerns the time a 'claim arises' under Section 2401 of the F.T.C.A. for negligent medical advice and treatment resulting later in advanced tuberculosis.
>
> ....
> ...But it is not the wrongful, i.e., negligent act, which gives rise to the claim. For there must be damage caused by it. Until there is some damage, there is no claim....
>
> ....
> ...We know that immediately upon Dr. Lowe's giving Reid the wrong advice, no harm from it had yet befallen Reid. All that occurred was that Reid heard words—words which were wrong and negligently spoken—but without injurious consequences of any kind at the moment.

> ....
> ...[C]onsequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. Id. at 692-695.

The Government's brief is predicated upon the misconception of the wording and basis of the Act when it says:

> ...To the extent that petitioner's claim is based upon governmental negligence in granting Sgt. Johnson leave (Pet. App. 10A), it is barred by the need, consistently recognized by this Court, to prevent 'second-guessing military orders.' (Stencel Aero Engineering Corp. v. United States, supra, 431 U.S. at 673) in Tort Claims litigation.

Contrary to this position, our Petition for Certiorari is not an attempt to "second-guess military orders." The stipulation that the

employees of the government were negligent does not constitute "second-guessing" anyone. It simply meets and complies with the Act's requirement; i.e., "that an employee of the government acting within the scope of his employment has been negligent." If, by proving this to be true and, therefore, proving that the cause of the resulting injury is by an employee acting in his military capacity bars recovery, then the Act automatically becomes a nullity. This just is not true. Nowhere is it expressed better and more cogently than by the Fifth Circuit decision where it held in the recent case of Parker v. United States, 611 F.2d 1007 (1980):

> ...[S]ervicemen killed in automobile collision on roadway within military reservation did not preclude an action by

survivors under the Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2671-2680; 38 U.S.C.A. §§ 101(16), 105(a).[2]

....

...In a series of decisions now referred to as the Feres doctrine, the United States Supreme Court implied an exception to the FTCA and held that no action lies for injury to a member of the armed forces whose activity at the time of injury is 'incident to military service.'

....

...The inquiry finally turns to what Parker was doing at the time he was injured. Parker was not directly subject to military control; he was not under the compulsion of military orders; he was not performing any military mission.

....

...Keeping in mind that 'incident' does not mean that a strict 'but for' test applies, we do not find that Parker was

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[2]The driver of the truck who negligently killed Parker was acting in his military capacity just as the others in the instant case were.

engaged in any activity incident to his service.

....

...Whether the exceptions to liability and the FTCA's waiver of sovereign immunity should be read broadly or narrowly are questions that have been answered inconsistently over the thirty-odd years since the statute's enactment.[3]

....

...Parker's four-day right to be absent resembled the furlough in Brooks. Because the collision did not occur off the base, the court should have looked to the function Parker was performing at the time of his death, which was not related to his military service.[4]

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[3]The truth of this statement is borne out by the argument in the Government's brief citing the various treatments given by the various Circuit Courts different from the Parker opinion.

[4]The Court emphasized this same point four (4) times in the course of its opinion, e.g., the inquiry finally turns to what Parker was doing at the time he was injured.

CONCLUSION

In view of the conflicting views expressed by Parker, Henning, Johnson (this case), et al., as to the application of the provisions of the Act, and to prevent further "inconsistencies" in answering questions involving suits by members of the armed forces which have "existed over the thirty-odd years since the statute's enactment" (Parker, supra;) and in view of the fact that the granting of this petition presents an opportunity for the Supreme Court to once and for all enunciate specific guidelines for future decisions involving suits instituted by members of the armed forces, or its beneficiaries under the Act consistent with the purpose of the Act, we respectfully submit that a Writ of Certiorari

should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Petitioner's Reply to Respondent's Memorandum in Opposition to Petition for Writ of Certiorari, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to each of the following, who constitute all counsel of record:

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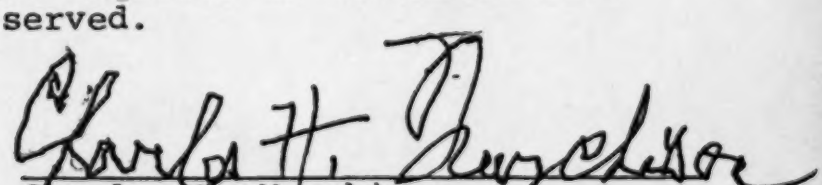
this 15th day of May, 1981. All parties required to be served have been served.



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